

Pai San & Ors v Public Prosecutor

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COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO P-05-47 OF 1998

MOKHTAR SIDIN, ABDUL HAMID MOHAMAD AND MOHD NOOR AHMAD JJCA

25 OCTOBER 2002

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Criminal Procedure — *Prosecution — Right to conduct prosecution — Validity of prosecution conducted by officer of Fisheries Department — Power given to Public Prosecutor to give consent to prosecute — Public Prosecutor's consent given to officer of Fisheries department — Whether officer of Fisheries Department authorized to conduct prosecution of the appellants — Exclusive Economic Zone Act 1984 s 38, Federal Constitution art 145(3)*

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Fisheries — *Licence — Operating fishing appliances without licence — Appellants charged for fishing in Malaysian waters without international agreement allowing the same or a valid permit issued under s 19 of the Fisheries Act 1985 — Prosecution conducted by officer of Fisheries Department, whether valid — No provision in Fisheries Act 1985 empowering officer of Fisheries Department to conduct prosecution — Whether Fisheries Act 1985 should be read together with Exclusive Economic Zone Act 1984*

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Statutory Interpretation — *Construction of statutes — Applicability — Whether Exclusive Economic Zone Act 1984 applicable to Fisheries Act 1985 — No provision in Fisheries Act 1985 empowering officer of Fisheries Department to conduct prosecution — Whether Fisheries Act 1985 should be read together with Exclusive Economic Zone Act 1984*

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The appellants were charged at the Balik Pulau Magistrate's Court for fishing in Malaysian waters without an international agreement allowing the same or a valid permit issued under s 19 of the Fisheries Act 1985, thereby committing an offence under s 25(a) of the Act. At the end of the prosecution's case, the appellants were called upon to enter upon their defences. At that stage, counsel for the appellants applied to the magistrate's court for the trial to be stayed and for the records of the proceedings to be referred to the High Court for the determination of a question law on the validity of the prosecution which was conducted by an officer of the Fisheries Department. The learned magistrate refused the application whereupon the appellants filed a notice of motion in the High Court at Penang applying, inter alia, for the orders that the prosecution of a charge under the Fisheries Act can only be conducted by the Public Prosecutor and that the prosecution conducted by an officer of the Fisheries Department was void and ultra vires the Federal Constitution. The learned High Court judge dismissed the appellants' application. The appellants appealed to the Court of Appeal.

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Held, dismissing the appeal:

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- (1) A provision giving the power to institute, conduct or discontinue a proceeding for an offence is unconstitutional and void if it is

- A** exercisable independently of, or if it is parallel to the powers vested in the Public Prosecutor by art 145(3) of the Federal Constitution. Consequently, any authorization given pursuant to such void provision is also void and the prosecution instituted and conducted by a person so authorized is void. However, if the
- B** power given to another person is subject to the powers of the Public Prosecutor under art 145(3) of the Federal Constitution, the same is valid (see pp 547I–548B).
- (2) In the instant case, although there was no provision in the Fisheries Act empowering an officer of the Fisheries Department to conduct the prosecution under the Fisheries Act, the Act
- C** should be read together with the Exclusive Economic Zone Act 1984. Section 38 of the Exclusive Economic Zone Act 1984 provides that ‘a prosecution for an offence under this Act or any applicable written law shall not be instituted except by or with the consent of the Public Prosecutor ...’ and the expression ‘or any applicable written law’ was defined in s 2 of the Exclusive
- D** Economic Zone Act 1984 as any written law provided to be applicable in respect of the exclusive economic zone, continental shelf or both. In relation to fisheries in the exclusive economic zone, the applicable written law was the Fisheries Act. Therefore, the words ‘A prosecution for an offence under this Act or any applicable written law’ in s 38 of the Exclusive Economic Zone
- E** Act 1984 referred, inter alia, to a prosecution for offences under the Fisheries Act (see pp 548B, 549H–550D).
- (3) Section 38(1) of the Exclusive Economic Zone Act 1984 provides that a prosecution shall not be instituted except by or with the consent of the Public Prosecutor. Here, the powers of the Public
- F** Prosecutor are not taken away from him and given to somebody else. His powers remain intact. It is the Public Prosecutor and he alone who may institute or give consent for a prosecution. That is consistent with his powers under art 145(3) of the Federal Constitution. Therefore, s 38(1) is constitutional and valid (see
- G** p 550F–H); *Repco Holdings Bhd v Public Prosecutor* [1997] 4 AMR 3938 (also in [1997] 3 MLJ 681), *Kyohei Hosoi v Public Prosecutor* [1997] MLJU 467; [1998] CLJ 1063, *Public Prosecutor v Lee Ming & Anor* [1998] 4 MLJ 113, *Queck Gin Hong v Public Prosecutor* [1998] 4 MLJ 161, *Rajendran all M Gurusamy v Public Prosecutor* [2000] 4 MLJ 639 and *Nguang Chan Sdn Bhd v Public Prosecutor* [2001] 2 MLJ 129 distinguished.
- H**
- (4) Section 38(1) of the Exclusive Economic Zone Act 1984 gives the Public Prosecutor power to give consent to prosecute and in the instant case he had, in the exercise of that power given his consent. The officer of the Fisheries Department, armed with that
- I** consent was clearly authorized to conduct the prosecution of the appellants. Therefore, the prosecution by the officer in this case was valid. Accordingly, there was no necessity to discuss the

provisions of the Criminal Procedure Code as the Public Prosecutor did not have to rely on the provisions therein (see p 550I-551B).

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[Bahasa Malaysia summary]

Perayu-perayu telah dituduh di Mahkamah Majistret Balik Pulau kerana menangkap ikan di perairan Malaysia tanpa perjanjian antarabangsa yang membenarkannya atau permit sah yang dikeluarkan di bawah s 19 Akta Perikanan 1985 ('Akta tersebut'), dan oleh itu telah melakukan kesalahan di bawah s 25(a) Akta tersebut. Pada penghujung kes pendakwaan, perayu-perayu telah dipanggil untuk memasukkan pembelaan mereka. Di peringkat itu, peguam bagi pihak perayu-perayu telah memohon kepada mahkamah majistret supaya perbicaraan digantung dan supaya rekod-rekod prosiding tersebut dirujuk kepada Mahkamah Tinggi untuk penentuan persoalan undang-undang mengenai keesahan pendakwaan tersebut yang telah dikendalikan oleh seorang pegawai Jabatan Perikanan. Majistret yang arif tersebut telah menolak permohonan itu, sesudah itu perayu-perayu memfailkan satu notis usul dalam Mahkamah Tinggi di Pulau Pinang memohon, antara lain, perintah-perintah bahawa pendakwaan sesuatu pertuduhan di bawah Akta Perikanan hanya boleh dikendalikan oleh Pendakwa Raya dan bahawa pendakwaan yang dikendalikan oleh seorang pegawai dari Jabatan Perikanan adalah batal dan ultra vires Perlembagaan Persekutuan. Hakim Mahkamah Tinggi yang arif telah menolak permohonan perayu-perayu. Perayu-perayu telah merayu kepada Mahkamah Rayuan.

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Diputuskan, menolak rayuan tersebut:

- (1) Sesuatu peruntukan yang memberi kuasa untuk memulakan, mengendalikan atau memberhentikan sesuatu prosiding bagi satu kesalahan adalah tidak berpelembagaan dan batal jika ianya boleh dilaksanakan secara bebas dari, atau jika ianya selari dengan kuasa-kuasa yang diberikan kepada Pendakwa Raya oleh perkara 145(3) Perlembagaan Persekutuan. Berikutan itu, sebarang kuasa yang diberikan selaras dengan peruntukan yang batal sedemikian adalah juga batal dan pendakwaan yang dimulakan dan dikendalikan oleh seseorang yang diberi kuasa sedemikian adalah batal. Walau bagaimanapun, jika kuasa yang diberikan kepada orang lain adalah tertakluk kepada kuasa-kuasa Pendakwa Raya di bawah perkara 145(3) Perlembagaan Persekutuan, ianya adalah sah (lihat p 547I-548B) .
- (2) Dalam kes ini, meskipun tidak terdapat peruntukan di dalam Akta Perikanan yang memberi kuasa kepada seorang pegawai dari Jabatan Perikanan untuk mengendalikan pendakwaan di bawah Akta Perikanan, Akta tersebut haruslah dibaca bersama dengan

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- A** Akta Zon Ekonomi Eksklusif 1984. Seksyen 38 dari Akta Zon Ekonomi Eksklusif 1984 tersebut memperuntukkan bahawa ‘a prosecution for an offence under this Act or any applicable written law shall not be instituted except by or with the consent of the Public Prosecutor ...’ dan ungkapan ‘or any applicable written law’ telah ditakrifkan di dalam s 2 Akta Zon Ekonomi Eksklusif
- B** 1984 sebagai sebarang undang-undang bertulis yang diperuntukkan supaya boleh dipakai berhubung dengan zon ekonomi eksklusif tersebut, pelantar benua atau kedua-duanya. Berhubung dengan perikanan di dalam zon ekonomi eksklusif tersebut, undang-undang bertulis yang boleh dipakai adalah Akta
- C** Perikanan. Oleh itu, perkataan-perkataan ‘A prosecution for an offence under this Act or any applicable written law’ di dalam s 38 Akta Zon Ekonomi Eksklusif 1984 merujuk, antara lain, kepada satu pendakwaan bagi kesalahan-kesalahan di bawah Akta Perikanan (lihat ms 548B, 549H–550D).
- D** (3) Seksyen 38(1) Akta Zon Ekonomi Eksklusif 1984 memperuntukkan bahawa suatu pendakwaan tidak boleh dimulakan kecuali oleh atau dengan keizinan Pendakwa Raya. Di sini, kuasa-kuasa Pendakwa Raya telah tidak dirampas daripada beliau dan diberikan kepada seorang yang lain. Kuasa-kuasa beliau tetap kekal. Pendakwa Raya dan beliau sahaja yang boleh memulakan atau memberi keizinan untuk satu pendakwaan. Itu adalah konsisten dengan kuasa-kuasa beliau di bawah perkara 145(3) Perlembagaan Persekutuan. Oleh itu, s 38(1) adalah berperlembagaan dan sah (lihat ms 550F–H); *Repco Holdings Bhd v Public Prosecutor* [1997] 4 AMR 3938 (juga [1997] 3 MLJ 681), *Kyohei Hosoi v Public Prosecutor* [1997] MLJU 467; [1998] CLJ 1063, *Public Prosecutor v Lee Ming & Anor* [1998] 4 MLJ 113, *Queck Gin Hong v Public Prosecutor* [1998] 4 MLJ 161, *Rajendran all M Gurusamy v Public Prosecutor* [2000] 4 MLJ 639 dan *Nguang Chan Sdn Bhd v Public Prosecutor* [2001] 2 MLJ 129 dibezaikan.
- E**
- F**
- G** (4) Seksyen 38(1) Akta Zon Ekonomi Eksklusif 1984 memberikan Pendakwa Raya kuasa untuk memberi keizinan untuk mendakwa dan dalam kes ini beliau telah, dalam melaksanakan kuasa itu memberikan keizinan beliau. Pegawai Jabatan Perikanan tersebut yang telah diberi keizinan itu jelasnya telah diberi kuasa untuk mengendalikakan pendakwaan perayu-perayu tersebut. Oleh itu, pendakwaan oleh pegawai tersebut di dalam kes ini adalah sah. Sehubungan itu, tiada keperluan untuk membincangkan peruntukan-peruntukan Kanun Prosedur Jenayah kerana Pendakwa Raya tidak perlu bergantung kepada peruntukan-peruntukan di dalamnya (lihat ms 550I–551B).
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Notes

For cases on the right to conduct prosecution, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2594–2604.

For cases on operating fishing appliances without license, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 3327.

For cases on applicability of construction of statutes, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1456.

Cases referred to

Kyohei Hosoi v Public Prosecutor [1997] MLJU 467, [1998] CLJ 1063 (distd)

Nguang Chan Sdn Bhd v Public Prosecutor [2001] 2 MLJ 129 (distd)

PP v Lee Ming & Anor [1998] 4 MLJ 113 (distd)

PP v Manager, MBf Building Services Sdn Bhd [1998] 1 MLJ 690 (refd)

Queck Gin Hong v Public Prosecutor [1998] 4 MLJ 161 (distd)

Rajendran all M Gurusamy v Public Prosecutor [2000] 4 MLJ 639 (distd)

Repco Holdings Bhd v Public Prosecutor [1997] 4 AMR 3938, [1997] 3 MLJ 681 (distd)

Legislation referred to

Criminal Procedure Code s 380(ii)(b)

Environmental Quality Act 1974 s 44

Environmental Quality (Clean Air) Regulations 1978 reg 12

Exclusive Economic Zone Act 1984 ss 2, 3(1), 6, 7, 8, 38, (1), Pt III

Federal Constitution art 145(3)

Fisheries Act 1985 ss 2, 15(1), 19, 24(1), 25(a)

Forests Ordinance (Sarawak Cap 126) s 92A

Immigration Act 1959/1963 s 58(2)

Road Transport Act 1987 ss 116, 119(2)

Securities Commission Act 1993 s 39, (2)

Securities Industry Act 1983 s 126, (2), 129

Trade Description Act 1972 ss 26(2), (3), 28B(3)

Rajasingam (Raj Shanker with him) (R Rajasingam & Co) for the appellant.

A Karim A Jalil (Deputy Public Prosecutor) (*Nurulhuda Nur'aini bt Mohd Nor* with him) for the respondent.

Abdul Hamid Mohamad JCA (delivering judgment of the court):

The appellants were charged at the Balik Pulau Magistrate's Court for fishing in Malaysian waters without an international agreement allowing the same nor a valid permit issued under s 19 of the Fisheries Act 1985, thereby committing an offence under s 25(a) of the Act.

At the end of the prosecution's case, the appellants were called upon to enter upon their defences. At that stage, learned counsel for the appellants

A applied to the court (the magistrate's court) that the trial be stayed and that the records of the proceedings be referred to the High Court for the determination of a question law on the validity of the prosecution which was conducted by an officer of the Fisheries Department, which was alleged to be void and unconstitutional. The learned magistrate refused the application.

B The appellants then filed a notice of motion in the High Court at Penang (Permohonan Jenayah No 44-4-98). The appellants prayed for the following orders:

- C**
- (1) that the prosecution of a charge under the Fisheries Act can only be conducted by the Public Prosecutor;
 - (2) that the prosecution conducted by an officer of the Fisheries Department is void and ultra vires the Federal Constitution and that such proceedings are unlawful;
 - (3) that all orders made by the magistrate in the case be set aside;
 - D** (4) that all the accused persons in the case (the appellants) be acquitted ('dibebaskan');
 - (5) any other order(s) that the court deems fit and proper to make.

It is to be noted that the challenge is on the power of the Fisheries Officer to conduct the prosecution.

E The learned judge dismissed the application. The appellants appealed to this court.

Judgment of the learned High Court Judge

F The learned judge addressed his mind to two issues. First, whether the consent ('izin') to prosecute given by the deputy public prosecutor (P1) was a valid consent. Secondly, whether the Fisheries Officer was authorized to conduct the prosecution of the appellants for the offence for which they were charged.

G The first issue became relevant because the learned counsel for the appellants had argued that the consent had no legal effect because there was no provision in the Fisheries Act for the Public Prosecutor to give the consent.

H On this question, the learned judge was of the view that, reading together the provisions of ss 6, 8 and 38 of the Exclusive Economic Zone Act 1984 and s 15(1) of the Fisheries Act, consent of the Public Prosecutor was required for the prosecution of the appellants. That consent was given. The learned judge was also of the view that s 38(1) of the Exclusive Economic Zone Act exists side by side and in harmony with the provisions of art 145(3) of the Federal Constitution. The learned judge concluded that the consent (P1) was valid and not unconstitutional.

I On the second issue, learned counsel for the appellants and the deputy public prosecutor agreed that if the offence was a non-seizable offence, the Fisheries Officer had the power to prosecute. On the issue whether the

offence was a non-seizable offence or not, the learned judge decided that it was a non-seizable offence. **A**

The appeal

Learned counsel for the appellants submitted that the crux of the appeal is whether a prosecution conducted by an officer from the Fisheries Department, particularly for an offence under s 15(1) read together with s 24(1) and punishable under s 25(a) of the Fisheries Act is valid. In other words, the question is whether the officer was properly authorized to conduct the prosecution. **B**

The learned counsel submitted that as there was no provision in the Fisheries Act authorizing the officer to prosecute, the Fisheries Act should not be read together with the Exclusive Economic Zone Act 1984, the prosecution had to rely on the provisions of s 380(ii)(b) of the Criminal Procedure Code (prior to the amendment by the Criminal Procedure (Amendment) Act 1998 which came into effect on 1 April 1998), that s 380(ii)(b) of the Criminal Procedure Code was ultra vires the Constitution and, therefore, the officer was not authorized to prosecute and the prosecution was null and void. **C**

Article 145(3) of the Federal Constitution reads: **D**

The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial. **E**

We shall now look at the case law. We begin with *Repco Holdings Bhd v Public Prosecutor* [1997] 4 AMR 3839 (also in [1997] 3 MLJ 681). The first thing that should be noted about that case is that, even though it is a decision of Gopal Sri Ram, a Judge of the Court of Appeal, it is a judgment of the High Court. The learned judge sat as a High Court Judge to hear a reference by the sessions court. **F**

That case concerns the constitutionality of s 126 of the Securities Industry Act 1983 and s 39 of the Securities Commission Act 1993. **G**

Section 126 of the Securities Industry Act 1983 reads:

- (1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.
- (2) A prosecution for any offence against any provision of this Act may be conducted by the Registrar or by any officer authorized in writing by the Registrar or by any officer authorized in writing by the Chairman of the Commission. **H**

Section 39 of the Securities Commission Act 1993 reads:

- (1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor. **I**
- (2) Any officer of the Commission authorized in writing by the Commission may conduct any prosecution or any offence under this Act.

A The learned judge held in the headnote at p 3939:

Therefore, the impugned subsections are ultra vires art 145(3) of the FC [Federal Constitution] save as follows. Section 126(2), to the extent that it allows the Registrar of Companies (Registrar) to conduct a prosecution, is not ultra vires art 145(3) of the FC, because such Registrar is normally a senior member of the Judicial and Legal Service who is normally gazetted as a Deputy Public Prosecutor (DPP). The Registrar therefore conducts the prosecution of an offence under the SIA [Securities Industry Act 1983] in the capacity of a DPP (see p 3948, lines 16-29).

B However the Chairman of the SC is not on an equal footing and cannot authorize or conduct prosecutions under the SIA (see p 3948 lines 29-32).

C Section 39(2) of the SCA [Securities Commission Act 1993] is void and unconstitutional as it wholly contravenes art 145(3) (see p 3949 lines 18-22).

It must be noted that the learned judge also held that the provisions of s 126(2) 'as originally cast' did not contravene art 145(3), because of the careful way in which it was drafted.

D It should be emphasized that the offending part of the new sub-s (2) of s 126 of the Securities Industry Act 1993 is that part that gives power to the Chairman of the Commission to authorize an officer to prosecute. On the other hand, under the old sub-s (2) of s 126, the conduct of a criminal prosecution by an advocate and solicitor 'with previous permission in writing of the Public Prosecutor' is valid. The determining factor is the existence of the 'permission in writing of the Public Prosecutor'. In other words, so long as that permission emanates from the Public Prosecutor, the provision is valid. The Chairman of the Commission or anybody else should not usurp the function of the Public Prosecutor provided by art 145(3).

E The next case is *Public Prosecutor v Manager, MBf Building Services Sdn Bhd* [1998] 1 MLJ 690. In that case, the defendant was charged with two offences under the Environmental Quality Act 1974. The defendant objected to the proceedings on a preliminary point that no prosecution could be had against the defendant because the Act did not contain a provision providing for a sanction by the Attorney-General to institute proceedings for offences under the Act. It was argued that the defendant could not be prosecuted for the offences as the Director General of Environmental Quality had no power to institute such proceedings. In other words, there should be a provision in the Act for either the sanction or consent of the Attorney-General to institute criminal proceedings, otherwise it would allow a person other than the Attorney General to institute such proceedings and that is unconstitutional.

F KC Vohrah J (as he then was) held that the lack of a provision in the Act providing for sanction by the Attorney-General or his consent to institute proceedings for offences under the Act did not invalidate the Act.

G The next case, in chronological order, is *Kyohei Hosoi v PP* [1997] 1 MLJU 467. This is a judgment of Augustine Paul JC (as he then was). In that case, the impugned section was s 58(2) of the Immigration Act 1959/1963 which reads:

No prosecution shall be instituted in respect of any offence against this Act without the sanction in writing of the Director General or of the Public Prosecutor or his Deputy.

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The sanction to prosecute in that case was given by the director general. So, following *Repco Holdings Bhd*, the learned judicial commissioner (as he then was) held that that subsection, in so far as it empowered the director general to sanction the institution of a prosecution, was void.

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Again it should be noted that what makes it void is the giving of the power to the director general to sanction the institution of a prosecution, parallel to that of the Public Prosecutor. In simple words, do not take away the powers of the Public Prosecutor and give it to somebody else.

The next case is *Public Prosecutor v Lee Ming & Anor* [1998] 4 MLJ 113. This is a judgment of Ian Chin J. The provision in question is s 92A of the Forests Ordinance (Sarawak Cap 126) which reads:

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Prosecution in respect of offences under this Ordinance or by any subsidiary legislation made hereunder may be conducted by —

- (a) The State Attorney General or any legally qualified officer authorized by him;
- (b) The Director; or
- (c) any forest officer or any other public officer generally or specially authorized in that behalf by the Director.

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The learned judge held that, following *Repco Holdings Bhd*, that section was unconstitutional, null and void as it allowed persons other than the Federal Attorney General to institute, conduct or discontinue proceedings for an offence.

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About two months later, Suriyadi J decided the case of *Quek Gin Hong v Public Prosecutor* [1998] 4 MLJ 161. In that case, the accused was charged for allowing open burning of certain vegetation waste without a license contrary to reg 12 of the Environmental Quality (Clean Air) Regulations 1978. He was convicted and sentenced to six months' imprisonment. On revision, it was, *inter alia*, argued that s 44 of the Environmental Quality Act 1974 was *ultra vires* art 145(3) of the Federal Constitution. Section 44 provides:

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Prosecution in respect of offences committed under this Act or regulations made thereunder may be conducted by the Director General or any officer duly authorized in writing by him or by any officer of any local authority to which any powers under this Act has been delegated.

Held, setting aside the order and acquitting the accused:

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- (1) Section 44 of the Act which endowed the director general with powers at par with the Public Prosecutor was void for inconsistency with art 145(3) of the Federal Constitution (see pp 164H–I and 165A); *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681 followed. Therefore, any documented authorization emanating from the director general was worthless and would not validate any shortcomings in the want of authority to prosecute (see p 165G–H).

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A In *Rajendran all M Gurusamy v Public Prosecutor* [2000] 4 MLJ 639, the applicant was charged with an offence under s 119(2) of the Road Transport Act 1987. The applicant objected before the magistrate that the police were not authorized by the Public Prosecutor to institute the proceedings. The relevant provision is s 116 of the Act which provides:

B Proceedings for an offence against this Act shall not be instituted or conducted except by or on behalf of the Public Prosecutor or by a police officer or traffic warden, Dato Bandar or a road transport officer, or as respects prosecution for an offence against any order or rules made by an appropriate authority under Part III, by an officer of that appropriate authority.

Abdul Wahab J held at p 650:

C Section 116 of the Road Transport Act envisaged that institution and conduct of prosecutions for offences under the Act and regulations thereunder by persons other than the Public Prosecutor ...

To that extent it offends against the sole authority interpretation of *Repco Holdings Bhd v Public Prosecutor*.

D We now come to the judgment of this court in *Nguang Chan Sdn Bhd v Public Prosecutor* [2001] 2 MLJ 129. The impugned section was s 28B(3) of Trade Descriptions Act 1972 that reads:

(3) Any prosecution in respect of an offence under this Act may be conducted by an Assistant Controller.

E Sections 26(2) and (3) of that Act, which was also considered, provides:

(2) The Controller shall subject to the general direction and control of the Minister have supervision in all matters relating to the enforcement of this Act and the Controller and the Deputy Controller shall perform such duties and exercise such powers and functions conferred upon him and upon an Assistant Controller by this Act.

F (3) All officers appointed under this section shall be deemed to be public servants within the meaning of the Penal Code applicable.

This court held that s 28B(3) was ultra vires art 145(3) of the Federal Constitution. Lamin Mohd Yunus PCA, delivering the judgment of the

G Court said at p 136:

There is nothing to suggest from s 28B(3) of the Act [Trade Descriptions Act 1972] that the assistant controller when acting under sub-s (3) that he is obliged to get either written authorization or consent from the Attorney-General or any deputy public prosecutor. It appears he is allowed to act independently. However he is under general 'supervision' by the controller who in turn the controller himself is under 'the general direction and control of the minister' when performing his functions such as supervising 'in all matters relating to the enforcement of this Act (see s 26(2)).

H It must be noted that in that case the prosecution was conducted by the assistant controller under a purported authority given to him by s 28B(3) of that Act. He acted independently of the Public Prosecutor.

I In our view, the judgments of the courts have been quite consistent. A provision giving the power to institute, conduct or discontinue a

proceeding for an offence is unconstitutional and void if it is exercisable independently of, or if it is parallel to the powers vested in the Public Prosecutor by art 145(3) of the Federal Constitution. Any authorization given pursuant to such (void) provision is void and the prosecution instituted and conducted by a person so authorized is void. However, so long as the power given to another person is subject to the powers of the Public Prosecutor under art 145(3) of the Federal Constitution, it is valid.

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What is the position in the present case? First, there is no provision in the Fisheries Act empowering an officer of the Fisheries Department to conduct the prosecution under the Act. Therefore, looking at that Act alone, the power for an officer of the Fisheries Department to conduct a prosecution must come from the Criminal Procedure Code, if any.

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However the learned deputy public prosecutor argued (the learned judge agreed with him) that the Fisheries Act must be read together with the Exclusive Economic Zone Act 1984. The learned deputy public prosecutor argued that if the two Acts were read together, then the provision of s 38 was applicable. As that section retained the power of the Public Prosecutor to give a written consent for a prosecution and as such written consent was given by the Public Prosecutor in this case (P1), the prosecution conducted by that officer was valid.

D

Let us first look at the relevance of this argument.

The Fisheries Act does not contain a provision regarding the power to prosecute similar to s 38 of the Exclusive Economic Zone Act 1984 or the other laws mentioned earlier. So, for power to prosecute one has to fall back on the provisions of the Criminal Procedure Code. On the other hand, if the two Acts are read together, then s 38 of the Exclusive Economic Zone Act 1984 comes into play in which case a prosecution conducted pursuant to a consent given in compliance with the provision of that section is valid.

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Should the two Acts be read together? The first thing we notice regarding the two Acts is that there are cross references in the two Acts to each other and overlapping provisions.

The preamble of the Fisheries Act, inter alia, reads:

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An Act relating to fisheries ... in *Malaysian fisheries waters* ... (Emphasis added.)

Section 15(1) of the Fisheries Act under which the appellants were charged in this case concerns fishing or attempt to fish by foreign fishing vessels in Malaysian fisheries waters.

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Section 2 of the Fisheries Act defines 'Malaysian fisheries waters' thus:

'Malaysian fisheries waters' means maritime waters under the jurisdiction of Malaysia over which exclusive fishing rights or fisheries management rights are claimed by law and includes the internal waters of Malaysia, the territorial sea of Malaysia and the maritime waters comprised in the exclusive economic zone of Malaysia;

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A Section 2 of the Fisheries Act also defines the ‘exclusive economic zone’:

‘exclusive economic zone’ means the exclusive economic zone of Malaysia as determined in accordance with the Exclusive Economic Zone Act 1984 [Act 311];

B We now look at the Exclusive Economic Zone Act 1984. Section 2 defines ‘Malaysian fisheries waters’:

Malaysian fisheries waters means all waters comprising the internal waters, the territorial sea and the exclusive economic zone of Malaysia in which Malaysia exercises sovereign and exclusive rights over fisheries.

C Sections 2 and 3(1) define and determine the ‘exclusive economic zone’ of Malaysia. Section 2 also defines the ‘territorial sea’. Part III, containing ss 6, 7 and 8 is entitled ‘FISHERIES’.

Section 6 provides:

The seas comprised in the exclusive economic zone shall be part of Malaysian fisheries waters.

D Section 7 provides:

The Minister charged with responsibility for fisheries shall also be responsible for fisheries in the exclusive economic zone.

Section 8 provides:

E Except as otherwise provided in this Act any written law relating to fisheries shall be applicable in the exclusive economic zone and on the continental shelf with such necessary modifications or exceptions as may be provided in an order made under section 42.

F From these provisions, we see the interconnection between the two Acts. Matters, including offences, relating to fisheries are provided in the Fisheries Act, which is understandable. The Exclusive Economic Zone Act 1984 does not provide for offences relating to fisheries. That is also understandable. It makes the minister charged with responsibility for fisheries responsible for fisheries in the exclusive economic zone, and for that purpose, the ‘authorized officer’ is defined as including ‘fisheries officer’, which is also understandable.

G So, if an offence relating to fishing is committed in the Malaysian fisheries waters but also within the exclusive economic zone, it is the responsibility of the minister charged with responsibility for fisheries. The authorized officers may exercise their powers provided by the Fisheries Act with a view to prosecution.

H We now come to prosecution. Section 38 of the Exclusive Economic Zone Act 1984 provides:

(1) A prosecution for an offence under this Act *or any applicable written law* shall not be instituted except by or with the consent of the Public Prosecutor:

I Provided that a person who is to be charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and any

person so arrested may be remanded in custody or released on bail, notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until that consent has been obtained.

- (2) When a person is brought before a court under this section before the Public Prosecutor has consented to the prosecution, the charge shall be read and explained to him but he shall not be called upon to plead thereto, and the provisions of the Criminal Procedure Code shall be modified accordingly. (Emphasis added.)

What is most significant are the words 'or any applicable written law'. The section does not only talk about a prosecution for an offence under 'this Act'.

'[A]pplicable written law' is defined in s 2 of the Exclusive Economic Zone Act 1984:

In this Act, unless the context otherwise requires —
'applicable written law' means any written law —

- (a) provided to be applicable in respect of the exclusive economic zone, continental shelf or both ...

We have seen that in relation to fisheries, even though in the exclusive economic zone, the applicable written law is the Fisheries Act. So, the words 'A prosecution for an offence under ... any applicable written law ...' clearly refers, inter alia, to a prosecution for offences under the Fisheries Act. We do not think there can be any other reasonable interpretation.

We shall now look closely at s 38 and see whether, first, it is unconstitutional and secondly whether a written consent given pursuant to it is valid.

Regarding the first, sub-s (1) provides that a prosecution shall not be instituted except by or with the consent of the Public Prosecutor. This provision is clearly distinguishable from the provisions of s 129(2) of the Securities Industry Act 1993, s 39(2) of the Securities Commission Act 1993 (*Repco Holdings Bhd*), s 58(2) of the Immigration Act 1959/1963 (*Kyohei Hasoi*), s 92A of the Sarawak Forests Ordinance (*Lee Meng*), s 44 of the Environmental Quality Act 1974 (*Quek Gin Hong*), s 116 of the Road Transport Act 1987 (*Rajendran all Gurusamy*) or even s 28B(3) of the Trade Descriptions Act 1972 (*Nguang Chan Sdn Bhd*).

The material distinguishing feature is that the powers of the Public Prosecutor is not taken away from him and given to somebody else. His powers remain intact. It is he and he alone who may institute or give consent for a prosecution. That is consistent with his powers under art 145(3) of the Federal Constitution. In our judgment, s 38(1) is constitutional. It is valid.

That being so, then the next question is whether a consent given by the Public Prosecutor to the Fisheries Officer, in this case, is a valid consent?

The answer is clearly in the affirmative. That section gives the Public Prosecutor power to give consent to prosecute. He has, in the exercise of that power given his consent. The officer, armed with that consent clearly

A is authorized to conduct the prosecution of the appellants. We are therefore of the view that the prosecution by the officer in this case is valid.

We do not think it is necessary to discuss the provisions of the Criminal Procedure Code. The Public Prosecutor did not have to rely on the provisions of the Criminal Procedure Code. The power is given by s 38(1) of the Exclusive Economic Zone Act 1984. It is in the exercise of that power that he gave his consent.

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In the circumstances, we dismiss the appeal and direct the learned magistrate to proceed with the trial.

Appeal dismissed.

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Reported by Lim Lee Na

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